No. 77-263

In the Supreme Court of the United States

OCTOBER TERM, 1977

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ET AL., PETITIONERS

v.

THE HONORABLE J. ROBERT MARTIN, JR., UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

CITATIONS

249-341—77——1

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–8a) is reported at 556 F. 2d 706. A prior opinion of the court of appeals (App. A, *infra*, pp. 1A–17A) is reported at 551 F. 2d 559.[1] The opinion of the district court (Pet. App. 9a–25a) is reported at 431 F. Supp. 1182.

[1] Petitioners have neglected to reproduce the court of appeals' first opinion. See Rule 23(1)(i) of the Rules of this Court. We have reprinted the opinion for the convenience of the Court as an appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1977. The petition for a writ of certiorari was filed on August 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court properly and consistently with the requirements of the First Amendment regulated statements by participants in a criminal trial.

2. Whether the district court's order was unconstitutionally overbroad or vague.

3. Whether the news media are entitled to notice and a hearing before a district court may issue an order regulating statements by participants in a criminal trial.

STATEMENT

An indictment returned in the United States District Court for the District of South Carolina charged J. Ralph Gasque, a South Carolina Senator, and two other persons with conspiracy to defraud the United States, filing false reports with the United States Department of Labor, and misapplication of federal funds. Trial was originally set for June 21, 1976.

On May 31, 1976, the district court (respondent Martin) issued an order (Pet. App. A) prohibiting, among other things, extrajudicial statements by any trial participant "which might divulge prejudicial matter not of public record in the case," and news interviews by any witness in the case "during the

trial period" (Pet. App. 1a). Petitioners are news organizations and journalists who moved to intervene in the criminal proceeding and to set aside this order. Petitioners argued that the order violated the freedom of the press and the Due Process Clause of the Fifth Amendment, which, they contended, required notice to them before issuance of the order.

On June 9, 1976, the district court denied petitioners' motion. Petitioners filed a notice of appeal, but the court of appeals dismissed petitioners' "attempted appeal from the district court's order" on the ground that they were not parties to the criminal action and therefore could not appeal from any order entered in that case (App. A, *infra*, p. 8A). The court treated the papers as a petition for a writ of mandamus, and it denied the petition on the ground that petitioners' right to the relief they sought was "far from clear and indisputable" (*id.* at 5A). The court also stated (*id.* at 1A–2A):

> It is clear, so far as this record now shows, that the criminal case involved was of great public interest and that it is easily classified as a widely publicized or sensational case as mentioned in the report of the Committee on the Operation of the Jury System * * *. The defendant Gasque, for example, was a State Senator and was in a campaign for reelection at the time the order was entered. Extensive press coverage followed the case.

The court suggested that petitioners could obtain review of the district court's order by filing a civil complaint in the district court (App. A, *infra*, pp. 8A–

12A). Petitioners accepted the suggestion and, on March 30, 1977, filed a complaint and motion for preliminary injunction challenging the original order of the district court.[2] On May 2, 1977, the district court dismissed the complaint (Pet. App. C). That court concluded that petitioners lack standing to assert the First and Fifth Amendment contentions they advanced and that, in any event, those contentions are without merit.

Petitioners appealed from this decision. On May 17, 1977, the court of appeals—again treating the papers as a petition for a writ of mandamus—held that petitioners have standing but denied the petition on the merits on the basis of the district court's opinion (Pet. App. B). The court modified the district court's order in two respects, which are not in issue here.[3]

The district court, in reasoning adopted by the court of appeals, explained that the criminal case was "widely publicized and sensational" (Pet. App. 20a) and that "the information contained in the media reports * * * is unrestrained and often of a prejudicial nature and would be inadmissible evidence at trial" (*ibid.*). The court concluded that "there is a substantial likelihood that the defendants would be denied a

[2] In the meantime, the criminal trial had been rescheduled to begin on May 23, 1977 (Pet. 7).

[3] The court of appeals held (Pet. App. 7a–8a) that the portion of the order prohibiting trial participants to "mingle" with reporters and photographers would apply only within the courthouse building and its entrances, and that the portion of the order barring photographing and sketching of jurors would apply only within the courthouse.

fair trial" (*id.* at 21a) unless it took some steps to prevent further comment by participants in the trial. The court held that its order "does not constitute a prior restraint on the press' or the public's right to speak or publish but only restrains the trial participants from certain conduct thereby proscribing the flow of prejudicial information to be gained by non trial participants" (*id.* at 19a). The court reasoned that a restraint on trial participants was authorized by this Court's decisions in *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, and *Sheppard* v. *Maxwell,* 384 U.S. 333, 361–362.

Petitioners' application to this Court for a stay of the district court's order was denied on May 23, 1977. 431 U.S. 928.[4] The criminal trial began on May 26, 1977. During the trial, the district court lifted the portion of the order that had prohibited the sketching of jurors in the courtroom.[5] The court also met with a committee of representatives of the press to discuss other possible modifications of the order.[6] The trial resulted in conviction of the defendants.[7]

ARGUMENT

Petitioners contend that this case presents important issues concerning the First Amendment right to

[4] Mr. Justice Brennan and Mr. Justice Marshall noted that they would have granted the stay.

[5] See Appendix B, *infra,* page 19A. Petitioners do not present any issue concerning the photographing and sketching provisions of the district court's order.

[6] *Ibid.*

[7] The conviction does not make this case moot. *Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 546–547.

report on criminal cases. There are, however, some fundamental differences between this case and *Nebraska Press Association* v. *Stuart*, 427 U.S. 539. The most important of these differences is that the district court's order is not directed to members of the press. It runs, rather, to the participants in the trial—lawyers, parties, witnesses, jurors and court officials—over whom the district court traditionally has exercised supervisory authority. No order here forbids the press to publish any information it may acquire. Moreover, the district court's order did not close any proceeding that is ordinarily open; the press was entitled to report on whatever happened in open court.

None of the persons described by the district court's order has protested its issuance. Whatever problems would arise if the defendants were to assert that they could not be prohibited from speaking out in their own defense therefore are not before the Court.[8] The question presented here, then, is whether in the circumstances of this case reporters' First Amendment rights were infringed by the order direct-

[8] It may be quite difficult to justify an order restraining comment by defendants. The indictment is a public charge of crime, and the defendants have a legitimate interest in conveying to the public their response to such a charge. See generally Freedman and Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi* v. *Obiter Dictum*, 29 Stan. L. Rev. 607 (1977). The court of appeals was sensitive to these concerns, and it expressed no opinion concerning the propriety of the district court's order as it applied to the defendants (Pet. App. 7a). It pretermitted consideration of this issue because the defendants did not object to the order or indicate that they desired to make public statements.

ing third parties not to grant interviews or divulge potentially prejudicial matter to petitioners.[9]

1. *a.* The order at issue in *Nebraska Press Association* forbade reporters to publish information that was legitimately in their possession. The state court entered that order without making any finding that other measures would have been inadequate to protect the accused's rights (427 U.S. at 563). This Court held that the extraordinary step of forbidding publication of information already in the public domain could not be justified by anything less than extraordinary danger to the defendant's rights. See also *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308.

The Court has recognized an important distinction, however, between the right to publish news and the right to gather news. The "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel* v. *Rusk*, 381 U.S. 1, 17. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to informa-

[9] We agree with the court of appeals (Pet. App. 6a) that petitioners have standing to assert whatever right to gather information they may have, provided that they can establish that the district court's order denied them access to information that would otherwise be available to them. The press asserts a claim of access peculiar to itself; petitioners are therefore the appropriate parties to present a claim of a right of "access" to news sources. Petitioners have standing here for the same reasons the press had standing to present the "access" claim in *Pell* v. *Procunier*, 417 U.S. 817, and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843. This conclusion, however, does not mean that there is a right of access in cases of this sort; it means only that petitioners are appropriate persons

tion not shared by members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817, 834.[10]

Petitioners do not contend that the district court's order has denied them access to information otherwise available to the general public.[11] They argue, rather, that unless they have greater access to information than the public generally they will be unable to report effectively on the case.[12] They rely upon the unquestioned principle that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681. But this principle, although important, has its limits, some of which were discussed in *Pell*, where this Court rejected a claim by the media to preferen-

to litigate whether there is such a right. For the reasons stated in the text, we submit that the strength of petitioners' arguments is substantially diminished by the fact that the district court's order does not operate directly on them.

[10] See also *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 850. This principle is especially compelling when the Fifth and Sixth Amendment rights of defendants to a fair trial are implicated. See, *e.g.*, *United States* v. *Gurney*, 558 F. 2d 1202 (C.A. 5) (press may be denied access to grand jury transcripts, bench conferences, and other private communications); *Garrett* v. *Estelle*, 556 F. 2d 1274, 1277 (C.A. 5).

[11] Only paragraph four of the district court's order (Pet. App. 1a), which applies to "news interviews," might be read as distinguishing between the press and other interested persons. But that paragraph simply rephrases the requirement of paragraph one that no participant in the trial disclose "prejudicial matter not of public record in the case."

[12] Petitioners' arguments in this regard share features in common with those presented by the press in *KQED, Inc.* v. *Houchins*, 546 F. 2d 284 (C.A. 9), stay issued, 429 U.S. 1341 (Rehnquist, J., in chambers), certiorari granted, 431 U.S. 928, argued November 29, 1977, in which the court of appeals held that the press is entitled to access to a prison greater than the access afforded to the general public. We believe, however, that questions concerning the right of the press to obtain information from trial participants are sufficiently different from questions presented by requests for access to physical facilities that there is no need to hold this petition pending the disposition of *Houchins*.

tial access to information in the possession of the government.[13]

Criminal defendants have important interests in receiving a fair trial; the public has important interests in speedy and effective prosecution of criminal charges. These interests are especially strong in sensational or widely publicized cases, for publicity of prejudicial information may make it more difficult to hold a fair trial. This Court therefore recognized in *Sheppard* v. *Maxwell*, 384 U.S. 333, 361–362, that participants in the trial could be subject on appropriate occasions to special restraints designed to ensure that any trial would be a fair one. The Court reaffirmed *Sheppard* in *Nebraska Press Association* v. *Stewart*, *supra*, 427 U.S. at 553–554, 564.[14] Mr. Justice Brennan, concurring in the judgment in *Nebraska Press*, also stated that courts "may stem * * * the flow of prejudicial publicity at its source, before it is obta ed by representatives of the press" (*id.* at 601). Mr. Justice Brennan stated, correctly in our view, that as "officers of the court, court personnel and at-

[13] The information in the possession of defendants, attorneys and witnesses cannot, of course, be equated with information in possession of the government, and the principle of *Pell* therefore does not apply directly to this case. But the court has a special interest in the information possessed by attorneys and others, and this interest, when coupled with a threat to a defendant's right to a fair trial, authorizes the court to issue a "no comment" order.

[14] The Court noted, however, that it was not presented with any question concerning such restraints (427 U.S. at 564 n. 8).

torneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases * * * and to impose suitable limitations whose transgression could result in disciplinary proceedings" (*id.* at 601 n. 27).[15]

Superviory limitations on public statements by participants in a criminal trial are a less sweeping palliative than prior restraints on the press. Limited-duration orders, which ultimately do not prevent public access to any information, should be permitted when they are reasonably necessary, in light of this Court's statement in *Sheppard* that courts must take strong measures to protect the rights of the accused. The Judicial Conference of the United States has recommended that district courts promulgate rules that would authorize orders like the one issued by the district court here,[16] and such rules are a reasonable accommodation of the competing interests.

The courts below adopted this practical accommodation in the instant case, reserving the use of such orders to cases in which there is a reasonable likelihood that publicity will interfere with the defendant's right to a fair trial. Two other courts of appeals have

[15] A court also has substantial authority over witnesses. *Geders* v. *United States*, 425 U.S. 80, 87.

[16] *Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 45 F.R.D. 391. See also Taylor, *Two Studies in Constitutional Interpretation* 117–173 (1969).

adopted a similar test. *Farr* v. *Pitchess*, 522 F. 2d 464, 468 (C.A. 9), certiorari denied, 427 U.S. 912; *United States* v. *Tijerina*, 412 F. 2d 661, 666 (C.A. 10), certiorari denied, 396 U.S. 990. Cf. *United States* v. *Gurney*, 558 F. 2d 1202 (C.A. 5).[17]

The Sixth and Seventh Circuits, however, have adopted a different test. The Sixth Circuit has indicated that an order prohibiting the discussion of a pending case by the parties concerned could be sustained only if it were "required to obviate serious and imminent threats to the fairness and integrity of the trial." *CBS, Inc.* v. *Young*, 522 F. 2d 234, 240 (C.A. 6). The Seventh Circuit has indicated that a "no comment" rule can be sustained only when comments "pose a 'serious and imminent threat' of interference with the fair administration of justice * * *." *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242, 249 (C.A. 7), certiorari denied *sub nom. Cunningham* v. *Chicago Council of Lawyers*, 427 U.S. 912.

Both *CBS* and *Chicago Council of Lawyers* involved situations significantly different from the facts of this case; there is no adequate reason to believe that those courts, applying their standards, would have decided the present case in petitioners' favor.[18] Moreover, additional experience in the lower federal courts with problems like the present one would be

[17] See also *United States* v. *Haldeman*, 559 F. 2d 31, 63 and n. 39 (C.A. D.C.) (*en banc*), certiorari denied *sub nom. Ehrlichman* v. *United States*, 431 U.S. 933 (referring to a "no comment" order as "appropriate" but not discussing the standard for the issuance of "no comment" orders).

[18] In *Chicago Council of Lawyers*, the lawyers themselves—the objects of the restraint—challenged a broad "no comment" rule

helpful in establishing whether the different verbal formulations—"reasonable likelihood" of prejudice versus "a serious and imminent threat" of prejudice—produce different results in practice. The Court's denial of certiorari in both *Farr* and *Chicago Council of Lawyers* after it had decided *Nebraska Press Association* permitted such development and experience to continue. There is no greater reason to grant review now than there was in those cases.[19]

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that applied to all pending cases, civil and criminal, without any showing that publicity would jeopardize the possibility of a fair trial in any particular case. Moreover, the rule posed serious notice problems, since it was difficult for the attorneys in any particular case to know with assurance whether the rule's strictures applied. By contrast, no attorneys are challenging the instant order, which was applied to only a single criminal case when the occasion arose, and which affords specific notice to the affected persons.

CBS was a civil rather than a criminal case, and the district court's sweeping order applied not only to the parties and their attorneys but also to their relatives, friends, and associates. The court of appeals concluded that a "more restrictive ban upon freedom of expression in the trial context would be difficult if not impossible to find" (522 F. 2d at 239). See also *United States* v. *Gurney*, *supra*, 558 F. 2d at 1208 n. 8 (sustaining a restraint on access by the press to information and distinguishing *CBS*). The need for "no comment" orders is at its greatest in notorious criminal cases such as this one, and the order is most easily sustainable when, as here, it is limited to the parties, their attorneys, and the witnesses, and when the restraint involves only discussion of "prejudicial matter not of public record" (Pet. App. 1a).

[19] Both *CBS* and *Chicago Council of Lawyers* were decided before this Court's decision in *Nebraska Press Association*, and it may be that the Sixth and Seventh Circuits would revise their criteria for the issuance of "no comment" orders in light of this Court's opinion, if given the occasion to do so. It would be premature to assume that any apparent conflict among the circuits will persist.

b. Petitioners argue (Pet. 18-22) that the circumstances of this case do not support the issuance of the district court's order even under the "reasonable likelihood of prejudice" standard employed by the courts below. Both lower courts reached a contrary conclusion, however, and there is no reason for this Court to review that essentially factual decision concurred in by two courts—especially because only the nature of the legal issue prevents this case from being moot (see note 7, *supra*). The district court found that the criminal case involving Senator Gasque was "widely publicized and sensational [in] nature," that there had been "numerous and extraordinary inquiries made by representatives of the press and news media to this Court" about the case, and that the media reports so far had been "unrestrained and often of a prejudicial nature," containing information that "would be inadmissible evidence at trial" (Pet. App. 20a). These findings, coupled with the court's additional determination that other measures would not be "likely to mitigate the effects of unrestrained comment by the trial participants in the criminal case,"[20] supported

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[20] The court noted, for example (Pet. App. 21a n. 6), that it was "simply not practical" to sequester the prospective jurors before trial. Although the court sequestered the jury at the start of trial, that action did not destroy the reasonableness of its order restricting pretrial communications by the trial participants. The need to restrict extrajudicial comments continued even during trial. As the Seventh Circuit said in *Chicago Council of Lawyers* v. *Bauer*, *supra*, 522 F. 2d at 256, the contrary "view assumes that a trial judge will never change his mind and release a sequestered jury. Then, there is always the possibility that an unedited newspaper or broadcast might reach even a sequestered juror."

its conclusion that there was a reasonable likelihood of prejudice to the accused in the absence of an order restricting comment by the trial participants.

2. Petitioners contend (Pet. 22–23) that the district court's order was unconstitutionally overbroad and vague. Although the ban on communications that "might divulge prejudicial matter not of public record in the case" (Pet. App. 1a) might have been made more specific by a delineation of the categories of information that would be prejudicial, petitioners were not harmed by the lack of specificity. Petitioners were not the addressees of the order; petitioners were not required to guess, at their peril, whether particular statements would be prejudicial, and in these circumstances petitioners are not entitled to invoke the rights of the defendants and their attorneys, who have not objected to the order or contended that it left them uncertain about what they could say. Petitioners do not contend that anyone subject to the order expressed concern about its vagueness as a reason for not providing information he otherwise would have provided. Moreover, petitioners could have asked the district court to clarify its order. Whatever vagueness terms such as "mingling" and "environs of the Court" may have possessed originally, they did not create uncertainty when read in the context of the remainder of the order (the focus of which was upon "statements" to or "interviews" with non-participants in the trial) and the narrowing construction of the court of appeals (see note 3, *supra*).

3. Finally, petitioners contend that they were entitled to notice and a hearing before the district court issued its order. We assume *arguendo* that the addressees of the order—defendants, attorneys, witnesses and court personnel—would be entitled to a hearing before they could be instructed not to discuss the case. But petitioners, who are only vicariously interested in the consequences of "no comment" orders, have no personal right to a hearing, because they are not directly affected by the order and would not be subject to sanctions under any conditions. Only those who might be subject to contempt for disobedience would be entitled to a prior hearing.[21] *United*

[21] Petitioners argue only that a district court has an obligation to afford a prior hearing to "the press" in every case. But such a requirement would impose a difficult task on the court, including identifying those to whom notice would be given and to whom a hearing would be offered. Who is "the press" entitled to notice and a hearing? Because all persons possess the same right to observe and speak, any attempt to restrict the notice and hearing to a small group would itself pose constitutional problems. How and to whom must notice be given in a trial that may be of nationwide interest? Must a district judge speculate about the identity of persons who might be interested in reporting on the trial? Must the court give advance notice even when the delay between notice and the hearing, and the holding of the hearing itself, might afford both opportunity and incentive for the making of the very prejudicial comments that the court sought to avert?

The "no comment" order issued by the district court was a public order, and the issuance of the order thus gave general "notice" of its contents. It is difficult to see how more particularized notice could have been provided. Once the order was issued, the district court met with attorneys for petitioners promptly. This offered petitioners an opportunity to make their objections and arguments known. It could be argued that members of the press have a right to such an opportunity, perhaps even to a more formal opportunity, to make their objections and attempt to establish that the order unnecessarily restricted their access to information. But

249-341—77——3

States v. *Schiavo*, 503 F. 2d 1 (C.A. 3) (*en banc*), certiorari denied *sub nom. Ditter* v. *Philadelphia Newspapers, Inc.*, 419 U.S. 1096, upon which petitioners rely, involved a prior restraint on publication, and that case therefore involved quite a different problem. The present case is the first that has considered the need for a hearing to be afforded to persons not themselves the addressees of the orders, and there is no conflict among the circuits on that question. As the district court noted here (Pet. App. 24a n. 9):

> In *Schiavo*, the trial judge issued a collateral order in a criminal case directly against the press * * * [which] prohibited the press from publishing and reporting upon certain state-

petitioners, which did not request any more formal hearing in the district court, do not make such an argument. It might be appropriate for the lower courts to explore the question whether such prompt hearings would sufficiently protect the rights of reporters who contend that they are injured by "no comment" orders, but the issue is not open for decision in the present case. Cf. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 and n. 9.

The press also would have a strong argument in an appropiate case that district courts should not be allowed to issue "no comment" orders without stating reasons why the orders are necessary. Cf. Fed. R. Civ. P. 65(d) ("every restraining order shall set forth the reasons for its issuance"). Findings would facilitate prompt appellate review of "no comment" orders and might assist the parties in the conduct of any later hearing to determine whether the order should be modified. The United States would not oppose a suggestion that appellate courts should, in the exercise of their supervisory powers, require a statement of reasons for the issuance of each "no comment" order. But the court of appeals did not pass on that question, and this case therefore does not present it for decision by this Court.

> ments. The May 31st order in this case does not restrict the press from publishing or reporting at all and is only directed at the conduct of trial participants in the criminal case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

No. 76-1757

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, ET AL., APPELLANTS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA ET AL., APPELLEES

Argued Sept. 1, 1976—Decided Jan. 13, 1977

Before CRAVEN, RUSSELL and WIDENER, Circuit Judges

WIDENER, *Circuit Judge:* The district court, in the criminal case of *United States* v. *J. Ralph Gasque, et al.,* No. 76-104, in the District of South Carolina, entered an order, previous to the trial, which has not yet been held, regulating the conduct of the participants in the trial and the conduct and seating of the press in the courtroom.

From this order, Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi, (Society) appeals those parts regulating the conduct of the participants in the trial and the conduct of the press in the courtroom.

It is clear, so far as this record now shows, that the criminal case involved was of great public interest and that it is easily classified as a widely

publicized or sensational case as mentioned in the report of the Committee on the Operation of the Jury System hereinafter referred to. The defendant Gasque, for example, was a State Senator and was in a campaign for reelection at the time the order was entered. Extensive press coverage followed the case.

The order, set out in the margin,[1] prohibited participants in the trial, including lawyers, parties, witnesses, jurors, and court officials from making "extrajudicial statements which might divulge prejudicial matter not of public record," and from "mingling with or being in proximity" to reporters and photographers in the environs of the court. It prohibited the release of names and addresses of prospective jurors, and the sketching or photographing of jurors within the environs of the court. It prohibited witnesses from news interviews during the trial period.

[1] The order reads in pertinent part as follows:

"For reasons appearing to the Court, it is Ordered that the above case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further Ordered that

"(1) Extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.

"(2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during recesses in the trial.

"(3) The names and addresses of prospective jurors are not to be released except on Order of Court, and no photograph shall be taken and no sketch made of any juror within the environs of the Court.

"(4) All witnesses are prohibited from news interviews during the trial period.

"(5) The United States Marshall at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,

(a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.

(b) Allocation of seats to the news media representatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

The Society did not contest the validity of section five of the order.

Pursuant to Rule 21(b) of the Federal Rules of Appellate Procedure, we entered an order permitting the district judge and the parties to the criminal action to respond to the purported appeal, for which purpose we treated the papers as a petition for mandamus. The Society is not a party to the criminal prosecution. Pursuant to 28 U.S.C. § 1651, we also entered a stay of the order.

We think the answer of the district judge correctly points out that we should not grant relief upon the petition for mandamus. We, therefore, vacate the stay, and, for reasons indicated below, dismiss the appeal.

This court may issue all writs "necessary or appropriate in aid of [its] * * * jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651. But the traditional use of the writ of mandamus under the All Writs Act, "in aid of appellate jurisdiction * * * has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1942). In issuing this order, the district judge neither exceeded nor refused to exercise jurisdiction. The most

that the Society can claim is that he has erred in matters within his jurisdiction. Extraordinary writs do not reach to such cases. *Parr* v. *United States,* 351 U.S. 513, 520, 76 S. Ct. 912, 100 L. Ed. 1377 (1955).[2]

A writ of mandamus is not a substitute for an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable. *United States* v. *Wilbur,* 283 U.S. 414, 420, 51 S. Ct. 502, 75 L. Ed. 1148 (1930). It has been said that the writ of mandamus will not issue to compel an act involving the exercise of judgment and discretion, *Louisiana* v. *McAdoo,* 234 U.S. 627, 633, 34 S. Ct. 938, 58 L. Ed. 1506 (1913), and that a Court of Appeals cannot use the writ to actually control the decision of the trial court, *Platt* v. *Minnesota Mining Co.,* 376 U.S. 240, 84 S. Ct. 769, 11 L. Ed. 2d 674 (1964), although the standard at least once has been stated in this court as abuse of discretion. *Akers* v. *N&W Ry.,* 378 F.2d 78 (4th Cir. 1967).

The order issued by the district judge was a result of his judgment that it was necessary to protect the

[2] See also *Will* v. *United States,* 389 U.S. 90, 98, n. 6, 88 S.Ct. 269, 275, 19 L.Ed.2d 305 (1967):

"* * * Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.' *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U.S. 212, 223, 225, 65 S.Ct. 1130, 1136, 89 L.Ed. 1566 (1945)." (dissenting opinion of Mr. Justice Douglas).

defendant's right to a fair trial. We do not reach the merits of the order and we express no opinion concerning its validity. We note only that it involved the exercise of judgment by the district court on a question not nearly conclusively settled in law, especially adversely to the opinion of the district court, that is, whether, rather than prohibiting the press from publishing information already obtained, ***which the district court did not do, and which may only be done in extraordinary circumstances*** not shown to be present here, it may indirectly prevent the press from obtaining information by regulating trial procedures and ordering the trial participants not to speak with members of the press.

In view of *Sheppard* v. *Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), *Nebraska Press Assoc.* v. *Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), and *Pell* v. *Procunier,* 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1973), the Society's right to relief from the order is far from clear and indisputable. Even considering abuse of discretion to be the standard, that has not been shown. Thus, we do not grant relief on the petition for mandamus.[3]

[3] We note that in *Chase* v. *Robson,* 435 F. 2d 1059 (7th Cir. 1970), the court held that mandamus was proper to review an order issued at the time of pre-trial motions in a criminal prosecution. That order, similar to the one before us, prohibited counsel and defendant from making statements concerning the trial to the press. The court held the order constituted a clear abuse of discretion and thus was a proper subject for mandamus. The opinion points out that the defendant in the criminal case was a petitioner and should not be required to await conviction and appeal. In the case before us, the defendant in the criminal case makes no objection to the order complained of. Whether he may validly complain is not a case before us, and we express no opinion

In *Sheppard,* the Supreme Court suggested several remedial procedures to prevent prejudicial publicity:

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on the question. *In re Oliver*, 452 F. 2d 111 (7th Cir. 1971), involved a similar question decided in the context of an attorney's disciplinary proceeding.

In *CBS, Inc.* v. *Young*, 522 F. 2d 234 (6th Cir. 1975), the court granted mandamus in a situation more analogous to that existing here. In the case of *Krause* v. *Rhodes*, a widely publicized case, the trial court had ordered that counsel, court personnel, parties and the parties' relatives, close friends, and associates to refrain from discussing in any manner whatsoever the case. The court ordered the district court to vacate this order, holding that the standard was that the activity restrained must pose a clear and present danger or a serious or imminent threat to a protected or competing interest, p. 238, which, of course, would be the right to a fair trial.

Chase, *Oliver*, and *CBS* were followed by *Nebraska Press Association* which not only cited *Sheppard* with approval, it added emphasis to the fact that "*the trial courts must take strong measures to ensure that the balance is never weighed against the accused.*" 427 U.S. p. 553, 96 S. Ct. p. 2800. And included in the quotation from *Sheppard* by the *Nebraska* court is the standard that "* * * where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," the judge should continue the case, transfer it, sequester the jury, or see that neither "the accused, witnesses, court staff, nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." p. 553, 96 S. Ct. p. 2800.

We construe the *Nebraska* opinion, so far as it may be read to permit the previous restraint of information already in the hands of the press, to require a clear and present danger to a fair trial. See *Near* v. *Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931). But where the trial court finds there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, although there may be no clear and present danger, we think the court in *Nebraska* has approved the standard set out in *Sheppard*, and that the order of the district judge here in question has not been shown on this record to violate the *Sheppard* standard as it regulates the conduct of the participants in the trial.

closely regulating conduct of newsmen in the courtroom, insulating witnesses, and proscribing "extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests * * * the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." 384 U.S. at 361, 86 S. Ct. at 1521. Thus, we see that, on its face, the district court's order falls within the *Sheppard* prescription. The Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391, especially 404–13, is of like effect.

In *Nebraska Press Assoc.* v. *Stuart,* 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), the Court struck down an order *restraining publication* of confessions, admissions, or facts "strongly implicative" of the accused in a widely reported murder of six persons. The order also prohibited reporting or commentary on judicial proceedings held in public. But, in so doing, it did not overrule *Sheppard.* Indeed, the Court cited with approval several passages from the *Sheppard* opinion, including the following:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused*
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> * * * * *

> *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming within the jurisdiction of the court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." [Emphasis added by the Court in *Nebraska*].

Finally, in *Pell,* the press challenged a regulation by the California Department of Correction on first amendment grounds. The regulation prohibited interviews with specific individual inmates. The Supreme Court upheld the regulation, saying: * * * "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 417 U.S. at 833, 94 S. Ct. at 2810. From these cases, it can be seen that the Society's right to the relief it seeks is far from clear and indisputable.

We also dismiss the Society's attempted appeal from the district court's order. It is clear that the Society should not participate in a case to which it is not a party. Even in civil cases, intervention requires an interest in the transaction or property before the court. FRCP 24. But the Society has no interest in the determination of the defendant's guilt or innocence to justify its intervention. Moreover, there is no counterpart to intervention in the criminal law or rules.

But it has been suggested that in keeping with the spirit of the Federal Rules,[4] we now treat the Society's motion for a stay in the district court as a complaint initiating an action against the district court's order, that is, that we treat this case as one which may be initiated on motion without a complaint. See *Di Bella* v. *United States,* 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1961); *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1930); *Cogen* v. *United States,* 278 U.S. 221, 49 S. Ct. 118, 73 L. Ed. 275 (1928).

[4] *Foman* v. *Davis*, 371 U.S. 178, 181–82, 83 S. Ct. 227, 230, 9 L. Ed 2d 222 (1962), suggests that decisions on the merits should not be based on the technicalities of procedures of pleading:

In *Go-Bart,* the Supreme Court permitted a third person to make a motion in a criminal case for return of his illegally seized property, even though the movant was not a defendant, himself, and had no stake in the defendant's guilt or innocence. Rule 41(e)[5] of the Federal Rules of Criminal Procedure is not inconsistent with the *Go-Bart* procedure and authorizes the court to proceed on the motion without a complaint. But the situation described in Rule 41(e) is different in every respect from the situation here. The court does not have in its custody property belonging to the Society.[6] No illegal search or seizure has been

> "* * * The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley* v. *Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action'."

[5] (e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained . . .

[6] In *Austin* v. *United States*, 297 F. 2d 356 (4th Cir. 1961), this court on a Rule 41(e) motion by a defendant in a criminal case considered the suppression of evidence, prior to indictment, that

made. To allow a proceeding by motion in this case under Rule 41(e) would not advance the purpose of that Rule, which was to implement the exclusionary rule. See *Jones* v. *United States,* 362 U.S. 257, 260, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).

Finally, we think Justice Black's opinion in *New Hampshire Fire Ins. Co.* v. *Scanlon,* 362 U.S. 404, 80 S. Ct. 843, 4 L. Ed. 2d 826 (1959), is persuasive against extending this procedure to cases which do not precisely fall within Rule 41(e) because the proceeding initiated on motion without a complaint is a summary procedure. In *New Hampshire Fire,* the Internal Revenue Service, in order to collect unpaid taxes, levied on a debt allegedly owed by the City of New York to the taxpayer. Rather than file a complaint, the insurance company filed a petition in the district court to quash the levy arguing that the debt was owed not to the taxpayer but to the insurance company. The Supreme Court was unwilling to let the insurance company bring its claim by way of petition and summary procedure, although an ordinary civil suit would have been filed:

> "* * * [T]he Federal Rules of Civil Procedure, 28 U.S.C.A., provide the normal course for beginning, conducting and determining controversies. * * * Rule 3 provides that 'A civil action is commenced by filing a complaint with the court.' * * * Other rules set out in detail

was not tangible personal property, but was, instead, information acquired from the defendant through the allegedly fraudulent and deceitful practices of IRS agents. The court held that such information may be suppressed, but that decision brings this case no closer to a Rule 41(e) motion. The Society is not seeking to suppress any of the evidence in Senator Gasque's trial, nor has it given any information to enforcement officers under fraudulent or deceitful circumstances.

> the manner, time, form and kinds of process, service, pleadings, objections, defenses, counterclaims and many other important guides and requirements for plenary civil trials. The very purpose of summary rather than plenary trials is to escape some or most of these trial procedures. Summary trials, as is pointed out in the petitioner's brief, may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even ex parte. * * * In the absence of express statutory authorization, courts have been extremely reluctant to allow proceedings more summary than the full court trial at common law.
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> * * * * *
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> "It is true that courts have sometimes passed on ownership of property in their custody without a plenary proceeding where, for illustration, such a proceeding was ancillary to a pending action or where property was held in the custody of court officers, subject to court orders and court discipline. See, e.g., *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 355, 51 S. Ct. 153, 157, 75 L. Ed. 374. But here there is no situation kindred to that in *Go-Bart.* What is at issue here is an ordinary dispute over who owns the right to collect a debt—an everyday, garden-variety controversy that regular, normal court proceedings are designed to take care of." 362 U.S. at 406–407, 409–410, 80 S. Ct. at 845.

The Society has shown no reason why its claim should be determined in a summary proceeding. Nor do we find any authorization for so treating it. We realize that questions concerning press coverage deserve timely consideration. See, *Nebraska,* 427 U.S. at 539, 96 S.Ct. 2791, yet no reason is shown why that might not otherwise be attained than by the dis-

ruption of a criminal trial. Our stay order has insured continuity of such rights thus far.

We are of opinion, therefore, that this case should not be treated as one initiated by motion without complaint. Since we find nothing in the criminal law or rules permitting the Society to intervene in this case, to introduce collateral issues, and to disrupt the pending criminal trial, we dismiss the appeal.

We emphasize that anything we have said touching the merits of the orders entered by the district court is to illustrate that the claim that the district court had a duty not to enter the order is not so clear as to warrant mandamus and is not a holding that the claim of the Society necessarily has no merit. We express no opinion on that question. If a separate suit is appropriate by the Society, our opinion here should not be construed as making that matter *res judicata* upon a proper record. We do not treat this as a garden variety case.

In conclusion, treating the papers filed as a petition for mandamus, the petition is denied; treating the papers filed as an appeal from the orders of the district court, the appeal is dismissed. It follows that our stay previously entered is dissolved.

CRAVEN, *Circuit Judge,* concurring and dissenting: I regret very much that we cannot decide the merits of this confrontation between fair trial and free press, but I agree with my brothers that because the facts have not been developed in the district court we could write, at most, an advisory opinion.[1] I would not, however, dismiss the appeal, but would, instead, hold that there is appellate jurisdiction and remand to the district court for a trial on the merits with instructions that the district court then find facts as required by the Seventh Circuit in *Chase* v. *Robson,* 435 F. 2d 1059 (1970).

[1] Although my brothers disclaim deciding the merits, they nevertheless construe *Nebraska Press Assoc.* v. *Stuart, supra,* as approving the standards of *Sheppard* v. *Maxwell, supra.* Since they have done so, I am compelled to express my disagreement, but the time for an exposition of it is not yet, and, because of dismissal, will be a little longer coming.

I.

I respectfully dissent from my brothers' decision to dismiss the appeal on the ground that "the Society should not participate in a case to which it is not a party." *Supra* at p. 563.

The court has embraced uncritically the doctrine that non-parties lack standing to appeal, so that the Society, not being a party to the criminal action, cannot appeal from an interlocutory order therein, however damaging its effect upon their First Amendment interests. Professor Moore formulates the basic idea less categorically: "*Ordinarily,* only a person who was a party in the court below and who is aggrieved by the judgment or order can appeal therefrom." 9 Moore's Federal Practice ¶203.06, at 715 (1975) (emphasis added). His adverb admits of exceptions—and exceptions there both are and must be if we are not to lose sight of the very purpose behind this judge-made rule. See *West* v. *Radio-Keith Orpheum Corp.,* 70 F. 2d 621, 623 (2d Cir. 1939); *United States* v. *Schiavo,* 504 F. 2d 1 (3d Cir. 1974); and *Overby* v. *United States Fidelity & Guaranty Co.,* 224 F. 2d 158 (5th Cir. 1955).

The rule embodies the generally valid assumption that non-parties, as to whom final decisions are not res judicata, do not have a sufficient interest in the controversy to lodge an appeal. Ordinarily, they have *nothing* at stake, for the law has never recognized

a philosophical concern as a legal interest. *Bodkin* v. *United States*, 266 F. 2d 55 (2d Cir. 1959). *See Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L. Ed. 2d 636 (1972), and *Baker* v. *Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L. Ed. 2d 663 (1962). As such, the party-only appeals rule merely reflects an early approach to the "case or controversy" requirement of Article III of the Constitution—and, more particularly, to that subclass of jurisdictional concerns commonly known as "standing" to litigate. *See West* v. *Radio-Keith-Orpheum Corp., supra*, 70 F. 2d at 623, Wright, Miller & Cooper, Federal Practice & Procedure, § 3531 (1975). But where the assumption that only parties are interested is not true and a non-party *is* aggrieved, we are free to exercise our constitutional and statutory jurisdiction. This is especially so since on its face our jurisdictional statute, 28 U.S.C. § 1291, does not limit appeals to parties, but contemplates appeals from all final decisions.

As Learned Hand observed in *West* v. *Radio-Keith-Orpheum Corp., supra*, 70 F. 2d at 624:

> The reason for [the party-only appeals doctrine] is that if not a party, the putative appellant is not concluded by the decree, and is not therefore aggrieved by it. ***But if the decree affects his interests, he is often allowed to appeal.***

[Emphasis added.] Accordingly, in a case like this one, the Third Circuit allowed the media to appeal from a "gag" order entered in a criminal case. *United States* v. *Schiavo, supra.*

The basic question of standing to litigate should be directly faced. It should not be avoided by resort to an inaccurate and outmoded presumption that nonparties cannot be harmed by what happens in some-

one else's lawsuit. No court has seriously questioned the litigable interest of the media in contesting a "gag" order. For instance, in *C.B.S., Inc.* v. *Young*, 522 F. 2d 234 (6th Cir. 1975), *supra* at p. 562 n. 3, in which the gag order ran solely against the parties, the court found that the local media was clearly aggrieved thereby:

> Although the news media are not directly enjoined from discussing the case, it is apparent that significant and meaningful sources of information concerning the case are effectively removed from them and their representatives. To that extent their protected right to obtain information concerning the trial is curtailed and impaired.

522 F. 2d at 239.[1] And despite my own fearful concern over the abuse of the "standing" requirement to avoid hard questions, I am confident here that not even a tortured application of that concept can plausibly deny the Society standing to litigate on appeal the validity of this "gag" order—or, which is the same thing, to have brought an original action in this regard. Compare *Tileston* v. *Ullman*, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603 (1943), with *Eisenstadt* v. *Baird*, 405 U.S. 438, 443–46, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). Indeed, by discussing the merits of the Society's mandamus petition, the court itself has impliedly and rightly resolved the basic question in appellant's favor.

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[1] That conclusion, of course, applies here *a fortiori* since paragraph (3) of the court's order, banning all photographing and sketching at trial, runs *directly* against the press; and, arguably, so does paragraph (4), banning news interviews by participants. *See* p. 56, *supra*.

II.

Accepting the court's opinion on its own terms, there is no reason why we may not properly treat the Society's motion for a stay in the district court as a complaint initiating an action against the district court's promulgation of "gag" rules. Despite Rule 7(a), a complaint is a complaint whether or not the word complaint appears on the paper writing. Indeed, Rule 8 of the Federal Rules of Civil Procedure talks about "claims for relief" and specifically provides that pleadings shall be construed so as to do substantial justice. I do not believe that any federal court would today hold that a complaint may be dismissed purely because it is not denominated as such, and I do not think the majority opinion goes quite so far. But if it does not, I fail to see why my brothers are unwilling to treat the motion for a stay as a complaint purely for purposes of appellate jurisdiction. I am sensitive to the thought that the harassed and overburdened district judge probably did not think of the motion as a complaint, but remand, with an instruction to treat it as such, prejudices neither him nor anyone else and would save a lot of wasted motion, time, and money.

Aside from whether the paper writing was given its proper name below, there is authority for the proposition that some causes of action can be begun without any complaint. The Supreme Court has twice so held: *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931); *Cogen* v. *United States,* 278 U.S. 221, 225, 49 S. Ct. 118, 73 L. Ed. 275 (1929). *See* 2 Moore's Federal Practice ¶ 3.04 (1975). I think this is such a case.

III.

Since it seems to me there is appellate jurisdiction on any of the above theories, I am not much concerned that my brothers conclude that mandamus does not lie. But both the Sixth and Seventh Circuits have concluded otherwise, as my Brother Widener recognizes. *Chase* v. *Robson,* 435 F. 2d 1059 (7th Cir. 1970); *In re Oliver,* 452 F. 2d 111 (7th Cir. 1971); *C.B.S., Inc.* v. *Young,* 522 F. 2d 234 (6th Cir. 1975).

IV.

This is one of those unfortunate procedural decisions that is of no help to anyone and really does not matter except in terms of delay. I think we can safely assume (unless their clients' money is exhausted) that as soon as counsel learn of our dismissal they will simply take the motion for a stay previously filed in the district court, perhaps change it a little and denominate it a "complaint," and file it and have it served on the judge. If the judge then denies a motion for a stay of his "gag" rules, counsel will then again ask this court for a Rule 8 stay order and will again appeal. And around we will go again. Today's decision not to proceed is the kind of expensive non-decision point that provokes Professor Frank to wonder if the elephant has not become too large to stand on his pedestal, and causes him to recommend that:

> All rules or statutes governing procedure should be carefully analyzed to ensure that their application *will not take undue court time or add to the cost of litigation.* The presumption in favor of economy and speed is rebuttable where fairness is at stake, but it is a strong presumption all the same.

J. Frank, American Law 69, 85, 90 (1969) [Emphasis added.]

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF SOUTH CAROLINA,
Greenville, S.C., 29603,
September 15, 1977.

Re: *Central South Carolina Chapter* v. *Martin*
Honorable THOMAS E. LYDON, Jr.,
United States Attorney,
United States Court House,
Columbia, South Carolina 29202

DEAR MR. LYDON: I wish to thank your office for recently providing me a copy of the petition for certiorari in the above captioned matter.

I would, of course, express no comments regarding the record that has been before this Court and the Court of Appeals. I am writing this letter to you with copies to the petitioners, as I cannot, however, avoid comment upon the inclusion of the letter marked Appendix D and the references to it in the petition since that letter has never before appeared in any record of the proceeding before this or any other court and so that your office may necessarily be advised of its circumstances.

On the first day of the criminal trial, *US* v. *J. Ralph Gasque, et al.*, I received word that the United States Supreme Court had denied the petitioners' stay and I so informed the members of the press who were present. I also indicated at that time that the provisions of my May 31, 1976 order as modified and upheld by the Court of Appeals would remain in effect

and if the press would form a representative committee as suggested in my May 2, 1977 order, I would consider any appropriate inquiries concerning the former order. The press did so and specifically asked about the sketching provisions of the order. Upon their specific request, I lifted that particular portion of the order provided the sketching was done unobtrusively.

On the second or third day of trial the letter marked Appendix D was hand delivered by James Harrison, Jr., Esq. to my law clerk who brought it to my attention later in the day. I did not immediately act upon the letter since it was vague and not specifically directed at any particular provisions of the May 31, 1976 order and since I had made it clear to the press, some of whom were represented by Mr. Harrison in this suit, that I would be available to consider provisions of that order if they would make appropriate inquiries through a representative committee. I met with that committee several times throughout the trial and no further requests directed at the May 31, 1976 order were ever made by its members. No one ever mentioned the contents of the letter delivered by Mr. Harrison. Additionally, no other inquiries of any kind ensued from Mr. Harrison over the delivery or contents of his letter.

Although I can appreciate the interests of the petitioners in this suit and have informally accommodated their specific requests on other occasions, their formal intervention in this case precluded me from handling their unspecific requests informally as they were well advised. I did not consider the letter marked Appendix D standing alone to be an appropriate inquiry upon which to act and when no follow-up inquiry

of any kind ensued regarding its indefinite contents, the criminal trial progressed and ended without its further consideration.

Very truly yours,

J. ROBT. MARTIN, Jr.,
United States District Judge.

cc:
James C. Harrison, Jr., Esq.

U.S. GOVERNMENT PRINTING OFFICE: 1977